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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 697

ALFRED ROMERO AND GLORIA J. ROMERO,
Petitioners,

vs.

TEN EYCK-SHAW, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TEN EYCK-SHAW, INC.,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

ALFRED ROMERO AND GLORIA J. ROMERO, petitioners, pray the Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled cause and the Order denying the petition for rehearing therein, and for cause, show:

OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the District of Nevada is not reported. The Findings of Fact and Conclusions of Law filed by the court appear in the appendix (p. 1)

JURISDICTION

The date of the judgment sought to be reviewed, which was also the time of its entry was August 28, 1968 (appendix p. 6). This opinion is not yet reported in the Reporters.

The date of the order denying the petition for rehearing was September 23, 1968 (appendix p. 10).

The date of the order staying issuance of mandate was September 27, 1968 (appendix p. 11).

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is USC, Title 28, Section 1254 as amplified by that part of Rule 19(b) of this Court which provides that this Court will, in considering the question whether it should grant a review on writ of certiorari, consider cases in which:

> "A court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter;
>
> "or has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether, in light of the rule that Workmen's Compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, language in such a statute stating: "The right to recover compensation pursuant to the provisions of this chapter (Workmen's Compensation Act) shall be the exclusive remedy against the employer . . ." is to be construed as a prohibition against an employee suing under the laws of another state (the benefits of which he is otherwise entitled to) after he has received compensation under the laws of the first state. Or, does such language merely provide that the remedies afforded by the Workmen's Com-

pensation law of a particular state shall be the exclusive remedies under the laws of that state.

STATUTES INVOLVED

Arizona Revised Statutes, Vol. 8

Page 239, Sec. 23-904:

"A. If a workman who has been hired or is regularly employed in this state receives a personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though the injury was received without the state.

B. If a workman who has been hired without this state is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if they are such that they can reasonably be determined and dealt with by the commission and the courts in this state."

Page 350, Sec. 23-1022(a):

"The right to recover compensation pursuant to the provisions of this chapter for injuries sustained by an employee shall be the exclusive remedy against the employer, except as provided by Sec. 23-906 and Sec. 23-964 (these exceptions are not pertinent to the instant case), and except where the injury is caused by the employer's willful misconduct and the act causing the injury is the personal act of the employer himself, or if the employer is in a partnership, on the part of one of the partners or if a corporation, on the part of an elective officer thereof, and the act indicates a willful disregard of the life, limb or bodily safety of employees, in which event the injured employee may, at his option, either claim compensation or maintain an action at law for damages."

Nevada Revised Statutes, Sec. 616-270(1):

> "Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter, and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment."

Sec. 616-270(2):

> "In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided."

Sec. 616370:

> "(1) The rights and remedies provided in this chapter for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise on account of such injury."
>
> "(2) The terms, conditions and provisions of this chapter for the payment of compensation and the amount thereof for injuries sustained or death resulting from such injuries shall be conclusive, compulsory and obligatory upon both employees and employers coming within the provisions of this chapter."

STATEMENT OF THE CASE

This case is now at a stage where the United States Court of Appeals for the Ninth Circuit has affirmed the decision of the United States District Court for the Distract of Nevada, granting respondent's Motion for Sum-

mary Judgment. The history of the case leading up to the granting of that motion is as follows:

Petitioner is a resident of the State of Arizona and was hired in Arizona by respondent's sub-contractor to work on a construction project in Nevada. (The place where petitioner was hired is a matter in dispute but the above statement was taken as true for the purpose of the motion for summary judgment.)

On or about January 27, 1965 petitioner was injured in an industrial accident while working for respondent. Petitioner filed a claim with the Nevada Industrial Commission and was awarded certain compensation therefor.

Petitioner then commenced an action against respondent in the United States District Court for the District of Nevada. Said action was commenced pursuant to the Arizona Workmen's Compensation Act being Title 13, Chapter 6 of Arizona Revised Statutes. The basis of federal jurisdiction was the diversity of citizenship of the parties and the amount in controversy exceeding $10,000. In response to the complaint filed by petitioner, respondent filed a motion to dismiss. Petitioner filed a response to the motion and a hearing was held. On November 21, 1966, the Motion to Dismiss was denied without prejudice to file a Motion for Summary Judgment. An answer to the Complaint was filed on January 11, 1967. A Motion for Summary Judgment was then filed by respondent. Petitioner filed a response to that motion and a hearing was held. On March 20, 1967, respondent's Motion for Summary Judgment was granted with Findings of Fact and Conclusions of Law being filed simultaneously.

Petitioner then appealed to the United States Court of Appeals for the Ninth Circuit. In an opinion dated August 28, 1968 the Court of Appeals affirmed the decision of the

District Court. In affirming that decision, the Court of Appeals found that the Nevada Workmen's Compensation Law had been properly applied to the facts of the case and that the "Exclusive Remedy" sections of Nevada Revised Statutes (N.R.S. 616.270 and 616.370) supra precludes the petitioner from seeking any other relief against his employer, even if such relief is available under the laws of Arizona.

ARGUMENT

The United States District Court and the United States Court of Appeals found as a matter of law that petitioner's injuries were compensable under the Nevada Workmen's Compensation Act and, that being true, the petitioner automatically was precluded from seeking relief under the Arizona Workmen's Compensation Act. It is the position of the petitioner that, in reaching this conclusion, both lower courts have decided an important state question in a way in conflict with applicable state law. Arizona Revised Statutes, Sec. 23-904 states as follows:

> "(a) If a workman who has been hired or is regularly employed in this state receives a personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though the injury was received without the state."

The two lower courts in the instant case have completely ignored this statute and have given undue weight to the "exclusive remedy" sections of Nevada Revised Statutes, Sections 616.270 and 616.370 in contravention to the decision of this court in *Industrial Commission of Wisconsin v. McCartin* (1947), 330 U.S. 662, 67 S.Ct. 886. In that case, referring to the Illinois Workmen's Compensation "exclusive remedy" statute (which is similar to the laws of both Arizona and Nevada), the Court said:

> "... But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment (citing cases). And in light of the rule that Workmen's Compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted (citing cases), we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is that true where the rights affected are those arising under legislation of another state where the full faith and credit provision of the United States Constitution is brought into play."

The Illinois "Exclusive Remedy" statute involved in the *McCartin* case reads in part as follows:

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act ..." (Ill. Rev. Stat. 1943, Ch. 48).

Clearly the Arizona and Nevada "Exclusive Remedy" statutes are no more restrictive than this one and they (like this one) should not be readily intepreted so as to cut off an employee's right to sue under other legislation passed for his benefit.

In view of the foregoing, petitioners feel that respondent's Motion for Summary Judgment should not have been granted and that the case should be tried and decided upon the question of whether or not the "Exclusive Remedy" section of the Nevada Workmen's Compensation Act does in

fact provide the degree of exclusivity which would preclude the petitioner from seeking to obtain the benefits of the Arizona Workmen's Compensation Act. Petitioners also contend that the above question should be considered in light of this Court's decision in the *McCartin* case.

Respectfully submitted,

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(Appendix Follows)

Appendix

In the United States District Court
for the District of Nevada

Civil No. 907

Alfred Romero and Gloria J. Romero,
Husband and Wife,
Plaintiffs

vs.

Ten Eyck-Shaw, Inc., XYZ corporations
1 through X, and John Doe 1 through X,
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Defendant, a Texas corporation, entered into a contract for the construction of a bank and garage building in Las Vegas, Nevada, in June, 1964.

2. Guy Apple Masonry Contractors, Inc., an Arizona corporation, entered into a subcontract with Defendant to perform certain masonry work for the Defendant on the bank job in November, 1964, and thereafter furnished labor and materials for said work between January, 1965, and February, 1966.

3. The masonry subcontractor filed with the Nevada Industrial Commission a report as an employer for the payroll period January, 1965, through March, 1965, reporting that Plaintiff was one of its employees during that period.

4. On or about January 27, 1965, Plaintiff was injured within the course and scope of his employment on the said bank and garage building.

5. The masonry subcontractor reported the injury to the Nevada Industrial Commission and Plaintiff filed a

claim with the Commission and has received in excess of $6,000.00 by way of compensation and medical expenses.

6. The masonry subcontractor did not make a claim for exemption from the provisions of the Nevada Act.

7. Plaintiff did not seek compensation under the Arizona Workmen's Compensation Act nor did Plaintiff commence an action in tort in Arizona but, alleging diversity of citizenship and the jurisdictional amount, commenced this action against the Defendant for damages for personal injuries.

8. Defendant moved to dismiss. The motion was denied without prejudice to a motion for summary judgment. The motion for summary judgment was filed by the Defendant, argued to the Court and submitted this 20th day of March, 1967.

Conclusions of Law

1. There is no genuine issue or material fact and Defendant is entitled to summary judgment as a matter of law.

2. The Nevada Industrial Insurance Act and not the Arizona Workmen's Compensation Act governs this case and this would be true if this action were commenced in the Nevada State Court, the Arizona State Court or the United States District Court for the District of Arizona.

If, as Plaintiff contends, the masonry subcontractor had complied with and was in good standing under the Arizona Act and had brought some twenty employees, including Plaintiff, to Nevada for the bank job, the masonry subcontractor could have become exempt from the Nevada Act under *NRS 616.260,* which reads:

> "1. Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this chapter while such employee is temporarily within this state doing work for his employer if such employer has furnished industrial insurance coverage under the industrial insurance act or similar

laws of a state other than Nevada so as to cover such employee's employment while in this state, provided:

"(a) The extraterritorial provisions of this chapter are recognized in such other state; and

"(b) Employers and employees who are covered in this state are likewise exempted from the application of the industrial insurance act or similar laws of such other state.

"The benefits under the industrial insurance act or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

"2. A certificate from the duly authorized officer of the industrial commission or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carried such industrial insurance."

In such a case, Plaintiff could have sought compensation under the Arizona Act or, if he desired, reject compensation under the Arizona Act and sue the Defendant in the State or Federal Courts, either Nevada or Arizona Constitution, Article 18, Section 8).

ARS 23-904 provides:

"A. If a workman who has been hired or is regularly employed in this state receives a personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though the injury was received without the state.

"B. If a workman who has been hired without this state is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if

they are such that they can reasonably be determined and dealt with by the commission and the courts in this state."

Under the Arizona Workmen's Compensation Act, like the Nevada Industrial Insurance Act, the prime contractor is made statutory employer of the subcontractor's employees (see *ARS 23-902* and *NRS 616.085*).

But the masonry subcontractor did not seek such exemption but, on the contrary, fully complied with the Nevada Industrial Insurance Act, as had the Defendant, the general contractor.

NRS 616.270 provides:

"1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

"2. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided."

NRS 616.370 provides:

"1. The rights and remedies provided in this chapter for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury.

"2. The terms, conditions and provisions of this chapter for the payment of compensation and the

amount thereof for injuries sustained or death resulting from such injuries shall be conclusive, compulsory and obligatory upon both employers and employees coming within the provisions of this chapter."

3. Plaintiff asks this Court to disregard the Nevada statute, which bars this action, and to apply the Arizona statute. This Court believes that the Nevada statute governs here and that this would be true whether this action was commenced against the Defendant in Arizona or Nevada, in the State or Federal Courts. The Arizona Workmen's Compensation Act has no application to this action. *Williamson v. Weyerhaeuser Timber Company,* 9 Cir., 1955, 221 F.2d 5; *Home Indemnity Company of New York v. Poladian,* 4 Cir., 1959, 270 F.2d; 156; *Simon Service Incorporated v. Mitchell,* 73 Nev. 9, 307 P.2d 110 (1957); *Titanium Metals Corp. of Amer. v. Eighth Jud. Dist. Ct.,* 76 Nev. 72, 75, 349 P.2d 444 (1960).

Dated: March 20, 1967.

/s/ Roger D. Foley
Roger D. Foley
United States District Judge

United States Court of Appeals
for the Ninth Circuit

No. 21,850

Alfred Romero and Gloria J. Romero,
Appellants,

vs.

Ten Eyck-Shaw, Inc.
Appellee.

[August 28, 1968]

Appeal from the United States District Court
for the District of Nevada

Before: MERRILL and DUNIWAY, Circuit Judges, and CRARY, District Judge*

DUNIWAY, Circuit Judge:

This in an appeal from a decision of the United States District Court for the District of Nevada, which entered summary judgment for the defendant. Jurisdiction is based upon diversity of citizenship. We affirm.

Alfred Romero, one of the appellants, was injured while working on a construction project in Nevada. The appellee, Ten Eyck-Shaw, Inc., was the general contractor for the project. Romero alleges that Ten Eyck's negligence was the cause of his injuries. Romero was employed by Guy Apple Masonry Contractor, Inc., a citizen of Arizona and a sub-contractor for Ten Eyck. There is some dispute as to

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*Honorable E. Avery Crary, United States District Judge, Central District of California, sitting by designation.

whether the contract whereby Romero was hired by Guy Apple was made in Arizona or in Nevada. In the absence of a finding on this point by the district judge, and because we are reviewing a summary judgment against Romero, we will assume that, as Romero contends, the contract was made in Arizona. The contract between Ten Eyck and Guy Apple was orally agreed upon in Nevada. The written contract was signed by Ten Eyck in Texas, mailed to Guy Apple, and signed by Guy Apple in Arizona.

Under the workmen's compensation system of Nevada, sub-contractors and their employees are deemed to be employees of the principal contractor. N.R.S. Sec. 616.085. An employee entitled to recover workmen's compensation in Nevada may not seek any other relief against his employer. N.R.S. Sec. 616.270. Romero has been awarded $6,184.67 as medical benefits and compensation by the Nevada Industrial Commission. Therefore, if Nevada law is applicable, Romero has no cause of action against Ten Eyck. *Tab Construction Co. v. Eighth Judicial Dist. Ct.*, 1967, 83 Nev. ....., 432 P.2d 90, and see *Titanium Metals Corp. of Amer v. Eighth Judicial Dist. Ct.*, 1960, 76 Nev. 72, 349 P.2d 444; *Simon Service Inc. v. Mitchell*, 1957, 73 Nev. 9, 307 P.2d 110.

Arizona's workmen's compensation plan is very similar to Nevada's. A.R.S. Sec. 23-902(B) makes employees of subcontractors employees of the general contractor for this purpose. Arizona also prevents a suit for damages at common law if the employee has not waived a coverage under the Arizona Act before receiving his injuries. A.R.S. Sec. 23-906. Appellants do not reveal exactly why they believe that the application of Arizona law would give them a cause of action in this case. But see *Tab Construction Co. v. Eighth Judicial Dist. Ct., supra*, 83 Nev. at ....., 432 P.2d at 91. However, we need not decide what the effect of applying

Arizona law in this siutation would be because the district court correctly applied Nevada law.

The proper function of federal courts in diversity cases with respect to choice of law problems "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Co.*, 1941, 313 U.S. 487, 497. Here, that means the Nevada law, the law of the forum state. The recent decision of the Nevada Supreme Court in *Tab Construction Co., supra*, on facts remarkably similar to this case, held that there was no compelling reason not to apply Nevada law. Relevant reasons cited by the court for applying Nevada law were that Nevada was the forum state, the place of residence of the general contractor, the place of the work injury, the place where the general contractor's business was localized, and the place where the employees worked. There are several ways in which the present case is similar. Here, as in *Tab Construction Co.*, the plaintiff employee was a citizen of Arizona and the subcontractor that employed him was an Arizona corporation. Here, as there, the general contractor was doing work in Nevada and complied with Nevada's workmen's compensation plan. Here, as there, Nevada is the forum state, the contract contemplated work there, the work was done there, and the injury occurred there. The principal difference is that Ten Eyck is a Texas corporation, not a Nevada corporation, and does not have its principal place of business in Nevada. Thus it is not a "resident" of Nevada. In both cases, the general contractor's only connection with Arizona is that it hired an Arizona subcontractor. Here, it appears that the subcontract and Romero's contract were made in Arizona. Whether this was also true in *Tab Construction Co.* does not appear. We regard these differences as of minor significance. We find nothing in the Nevada decisions that convinces us that

they would induce Nevada to apply Arizona law here. On the contrary, we think that here as in *Tab Construction Co.*, "all of Nevada's relevant policies of workmen's compensation are vitally involved" (83 Nev. at ....., 432 P.2d at 92).

Nor does the full faith and credit clause require that Nevada apply Arizona law here. Generally, in workmen's compensation cases, either the state where the injury occurred, *Pacific Employers Inc. v. Industrial Accident Commission,* 1939, 306 U.S. 493, or the state where the employment contract was made, *Carroll v. Lanza,* 1955, 349 U.S. 408; *Alaska Packers Assoc. v. Industrial Commission,* 1935, 294 U.S. 532, may apply its own law. Nevada is the state where the injury occurred. We think that it may, and that it would apply its own law here.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, September 23, 1968

Before: MERRILL and DUNIWAY, Circuit Judges, and CRARY, District Judge

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant filed September 13, 1968 and within time allowed therefor, and valid extension thereof, by rule of court, for a rehearing of above cause be, and hereby is denied.

Oct 1 1968

United States Court of Appeals
For the Ninth Circuit

No. 21850

Alfred Romero and Gloria J. Romero,
Appellants,

vs.

Ten Eyck-Shaw, Inc.
Appellee.

Filed—Sep 30 1968

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Gerald B. Hirsch counsel for the Appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 41(a)* of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before October 27, 1968. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

Charles M. Merrill
United States Circuit Judge.

September 27, 1968
Dated: San Francisco, Calif.

We will prepare a certiorari record
when directed to do so

*of the Federal Rules of Appellate Procedure